No. 86-1266

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1986

GLORIA LEE WEISS MARMION KILKENNY, Personal Representative of the Estate of MATTHEW KANE MARMION, DECEASED,

*Petitioner,*

*vs.*

ATLANTIC RICHFIELD COMPANY, ARCO MARINE, INC., and ARCH TANKERS, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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68 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Where in an action brought under the Jones Act the record contained facts that supported the conclusion that Atlantic Richfield Company, acting through its agents and employees was guilty of negligence, did not the district court err when it granted summary judgment on the basis that the vessel was neither owned nor operated by Atlantic Richfield Company?

2. Whether the court below misconstrued *Schiavone v. Fortune*, ____ U.S. ____, 106 S. Ct. 2379 (1986), and thereby erred in dismissing petitioner's amended complaint against respondents Arco Marine, Inc. and Arch Tankers, Inc. where, pursuant to Federal Rule of Civil Procedure 15(c), the claims asserted against these respondents in the amended complaint should have related back to the date of the original complaint and were therefore not time barred?

## LIST OF PARTIES

The parties to this action in the United States Court of Appeals for the Ninth Circuit were as follows: Gloria Lee Weiss Marmion Kilkenny, as Personal Representative of the Estate of Matthew Kane Marmion, Deceased, Plaintiff-Appellant; and Arco Marine, Inc., Arco Tankers Inc., and S.S. ARCO Alaska, Defendants-Appellees.

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No.

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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Gloria Lee Weiss Marmion Kilkenny respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 19, 1986.

## OPINIONS BELOW

The majority opinion of the panel of the United States Court of Appeals for the Ninth Circuit affirming both the summary judgment granted to Atlantic Richfield Company and the dismissal of petitioner's amended complaint against Arco Marine, Inc. and Arch Tankers, Inc. was filed on September 19, 1986 and is marked for publication, although petitioner is unaware of a citation for this opinion. The opinion appears in the Appendix, *infra* at 2a. The unpublished opinion of the Ninth Circuit denying petitioner's petition for a rehearing was filed on October 27, 1986 and appears in the Appendix at 1a. The unpublished opinions of the United States District Court for the Central District of California appear in the Appendix at 18a-23a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, entered on September 19, 1986, appears in the Appendix at 2a. On October 27, 1986, the Ninth Circuit denied petitioner's timely petition for rehearing (1a), and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## RULES INVOLVED

### Federal Rule of Civil Procedure 56(c)

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

**Federal Rule of Civil Procedure 15(c)**

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is atisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

## STATEMENT OF THE CASE

### A. Jurisdiction

Petitioner's complaint and amended complaint were brought in the district court pursuant to the Maritime Law of the United States as modified by the Jones Act 46 U.S.C. §§ 688, *et seq.* Jurisdiction therefore arose under 28 U.S.C. § 1331 which provides that the district courts shall have original jurisdiction of all civil actions arising under the laws of the United States.

### B. Statement of Material Facts

On December 26, 1981, Matthew Marmion, a professional diver, was killed as a result of being sucked into the suction pump

of the S.T. ARCO ALASKA. It was concluded as a result of a United States Coast Guard inquiry that the suction pump was negligently turned on while Marmion was within the pump room. The Coast Guard found that the individuals responsible for the pump being turned on and therefore responsible for the death of Marmion were two employees of the Atlantic Richfield Company (sometimes referred to as "Arco"). These employees, Chief Engineer W. Scott Hale and his assistant, Luther Weaver, were deemed guilty of negligence. As to Hale, his negligence supported the suspension of his license by the United States Coast Guard (31a).

Not only was the negligence of these two employees clear, but there was no credible issue as to the fact that Atlantic Richfield Company was their employer. At the Administrative Hearing, Mr. Hale stated:

> Q. How long have you worked with Arco? A. Practically 12 years.
>
> Q. Since what date? A. Since January of 1971.

Also in the record are letters confirming Mr. Hale's employment by Atlantic Richfield.

Relief Engineer Luther Weaver testified at the Administration Hearing as follows:

> Q. For the record, will you please state your full name, and your occupation? A. Luther Allen Weaver, and I'm Relief Engineer for Atlantic Richfield, Long Beach, California.
>
> Q. Do you hold a Coast Guard

license? A. Yes, I do. Chief Engineer's license.

Q. Chief Engineer's for Steam — A. Steam vessels.

Q. On the 26th of December, 1981, were you employed on the ARCO ALASKA? A. Yes.

In October of 1982, the personal representative of Marmion's estate brought suit against Atlantic Richfield Company in the United States District Court for the Eastern District of Pennsylvania. The suit sought damages under the Jones Act, 46 U.S.C. § 688 and the General Maritime Law. The complaint in paragraph 4 alleged that:

> At all times material hereto, defendant Atlantic Richfield Company (hereinafter ARCO) owned, operated, managed, possessed and controlled the vessel ST ARCO ALASKA in coastwise, intercoastal and foreign commerce.

And in paragraph 7:

> Death of plaintiff's decedent was caused by negligence of defendant, Atlantic Richfield Company by their agents, servants, workmen and employees and the unseaworthiness of the vessel, and by defendant's breach of their obligations under the circumstances, including their obligation to provide prompt and adequate treatment, care maintenance and cure.

Respondent Arco answered the complaint by denying ownership operation and control and alleging that the vessel was owned by Arco Tankers and operated by Arco Marine.

Additionally, the allegation incorporated in paragraph 7 was denied.

The matter was transferred to the United States District Court for the Central District of California. In January 1985 Atlantic Richfield moved for summary judgment. They asserted as a basis therefore that the S.T. ARCO ALASKA was neither owned nor possessed by Arco, but that on the contrary ownership and possession lay in two other companies — Arco Marine and Arch Tankers. Despite the clear allegation of Atlantic Richfield's responsibility for the negligence of its employees contained in paragraph 7, the motion for summary judgment did not address this issue.

At the time of argument counsel for Marmion emphasized the fact that while Arco Marine and Arch Tankers were the owners and operators of the vessel, their presence in the lawsuit was not necessary as there was an overwhelming amount of evidence presented to the court by way of the Coast Guard record that Atlantic Richfield Company was responsible for the acts of its employees. In this regard Marmion's counsel squarely placed this issue before the district court (34a):

> At the hearing before the administrative law judge there was testimony that the persons who were responsible for the negligent act, Mr. Weaver, Mr. Hale, were employees of Atlantic Richfield, not even Arco Marine.
>
> So that we don't need Arco Marine in order to proceed in this matter. It would be nice if they were here, but Atlantic Richfield is a proper defendant in this hearing.

Despite the overwhelming evidence of Atlantic Richfield

Company's culpability as a result of the negligence of their employees, despite the clear assertion in the complaint as to this theory of negligence as well as the argument made by counsel during the hearing on the motion for summary judgment the district court granted the motion. It did so on the basis that Atlantic Richfield Company neither owned, operated nor possessed the vessel and ignored totally the issue of Atlantic Richfield's liability under theories of *respondeat superior.*

Subsequent to the filing of the original complaint against Atlantic Richfield Company in Philadelphia and its eventual transfer to the Central District of California, the petitioner instituted an action in the United States District Court for the Northern District of California against Arco Marine and Arch Tankers. This action was transferred to the United States District Court for the Central District of California and was eventually dismissed. Neither party moved to consolidate.

Prior to oral argument on Arco's motion for summary judgment, petitioner sought leave to amend its complaint in order to add Arco Marine and Arch Tankers on the record. This was done because of the court's indication of its intent to dismiss the action against the Atlantic Richfield Company. Petitioner sought to amend the complaint pursuant to Rule 15(c). Arco Marine and Arch Tankers filed motions to dismiss the amended complaint. In their motion to dismiss Arco Marine and Arch Tankers admitted that they were not prejudiced by the proposed amendment to the complaint nor were they without notice that they were potential parties to this litigation. Their sole contention was that Marmion was not operating under the type of mistake necessary to bring into play the provisions of Rule 15(c).

The district court concluded that the mistake in not bringing Arco Marine and Arch Tankers upon the record originally was not that type of mistake that would justify the application of Rule

15(c). Despite the fact that respondents agreed that they were not prejudiced and agreed that they were fully informed of the litigation and knew that they were parties to be sued, the court ruled that the mistake must continue until the time of the proposed amendment.

On appeal, the United States Court of Appeals for the Ninth Circuit ruled that the mistake necessary to trigger the application of Rule 15(c) must be a continuing one. Judge Canby dissented stating that the cause presented was appropriate for the application of Rule 15(c) and that there need not be a continuing mistake — merely one at the institution of the proceedings. Especially so in this case there was no claim of prejudice on the part of the defendants.

Interestingly, the Court of Appeals affirmed the dismissal of the complaint against Atlantic Richfield Company on the basis that that company neither owned, possessed nor controlled the vessel. Apparently misled by the limited scope of the order for summary judgment, the appellate court deigned not to deal with the issue of Atlantic Richfield's responsibility under the concept of *respondeat superior*. Citing their opinion, *Villar v. Crowley Maritime Corp.*, 782 F. 2d 1478 (9th Cir. 1986), the court concluded that they would not decide this issue as they opined that the matter was not raised in the court below. Ignoring the specific provision of the complaint dealing with *respondeat superior;* ignoring the voluminous Coast Guard exhibits which definitively established the liability of Atlantic Richfield Company under this theory of law; and ignoring completely the argument of Marmion's counsel who specifically and unequivocally directed the court's attention to Atlantic Richfield's responsibility for the negligence of Mr. Weaver and Mr. Hale, the Court of Appeals refused to decide this issue.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN IN FACT THE RECORD CONTAINED CLEAR EVIDENCE THAT ARCO, ACTING THROUGH ITS EMPLOYEES AND AGENTS WERE NEGLIGENT AND THAT THIS NEGLIGENCE WAS THE PROXIMATE CAUSE OF DECEDENT'S DEATH.

There is no dispute that in dealing with a motion for summary judgment a court must view the entire record in the light most favorable to the non-moving party and summary judgment may be granted only where there is no genuine issue of fact. *See Continental Casualty Co. v. City of Richmond,* 763 F. 2d 1076 (9th Cir. 1985).

Especially is this true in cases under the Jones Act where the decisions of this court teach that the Congress vested the power of decision in the hands of the jury. *See Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 510 (1957) and *Webb v. Illinois Central Railroad Co.,* 352 U.S. 512 (1957).[1]

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1. *See also, Schulz v. Pennsylvania R. Co.* 350 U.S. 523 (1956); *Stone v. New York, Chicago & St. Louis R. Co.* 344 U.S. 407 (1953); *Carter v. Atlanta & Saint Andrew Bay R. Co.,* 338 U.S. 430 (1949); *Wilkerson v. McCarthy,* 336 U.S. 53 (1949); *Anderson v. Atchison Topeka & Santa Fe R. Co.,* 333 U.S. 821 (1948); *Lillie v. Thompson,* 332 U.S. 459 (1947); *Myers v. Reading Co.,* 331 U.S. 477 (1947); *Ellis v. Union Pacific R. Co.* 329 U.S. 649 (1947); *Jesionowski v. Boston & Maine R. Co.,* 329 U.S. 452 (1947); *Lavender v. Kurn,* 327 U.S. 645 (1946); *Keeton v. Thompson,* 326 U.S. 689 (1945); *Blair v. Baltimore & Ohio R. Co.,* 323 U.S. 600 (1945); *Tiller v. Atlantic Coast Line R. Co.,* 323 U.S. 574 (1945); *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29 (1944); *Bailey v. Central Vermont Railway Co.,* 319 U.S. 350 (1943); *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54 (1943); *Seago v. New York Central R. Co.,* 315 U.S. 781 (1942); *Jenkins v. Kurn,* 313 U.S. 256 (1941).

In the case at bar the Coast Guard hearings that were made part of the lower court record made it clear that Atlantic Richfield Company acting through its employees, Weaver and Hale, were negligent and that their negligence was the direct cause of the death of decedent. Further, the testimony of Weaver and Hale left no question but that they were in the employ of Atlantic Richfield Company at all times relevant to this situation. Accordingly, there is no question but that the facts before the trial court called for a finding of negligence on behalf of Atlantic Richfield Company. Certainly, a factual issue was presented that precluded the entry of summary judgment.

The district court nonetheless erred in concluding that because Atlantic Richfield Company did not own, possess or control the vessel they cannot be responsible. The court completely ignored the fact that the evidence overwhelmingly established the negligence of Atlantic Richfield Company under theories of *respondeat superior*.

The record before the court contained the complaint, paragraph 7 of which squarely raised the issue of the responsibility of Atlantic Richfield Company because of the negligence of its employees. The record further contained the transcript of the Coast Guard that squarely placed the cause of death upon the negligence of these employees. Additionally, the record contained the testimony of the employees themselves who stated unequivocally that they were employed by Atlantic Richfield Company at all times relevant to this litigation. Further, this material was sharply brought to the attention of the district court when at a hearing in Los Angeles on February 11, 1985 counsel stated (35a):

> "At the hearing before the administrative law judge there was testimony that the persons who were responsible for the negligent act, Mr. Weaver, Mr. Hale, were employees of Atlantic Richfield, not

even Arco Marine.

> So that we don't need Arco Marine in order to proceed in this matter. It would be nice if they were here, but Atlantic Richfield is a proper defendant in this hearing."

Nonetheless the Court of Appeals relying upon *Villar v. Crowley Maritime Corp.*, 782 F. 2d 1478 (9th Cir. 1986), erroneously refused to deal with the issue of vicarious liability. *Villar* deals with appellate abstention in the face of theories presented for the first time on appeal where the district court had no opportunity to rule. This is not such a case. From the complaint, through the exhibits, through the argument at the hearing on the motion to dismiss, the district court was always specifically alerted to Arco's responsibility under the theories of *respondeat superior*. The fact that the district court ineptly drafted its ruling on the motion for summary judgment so as not to mention this concept should not afford an appellate court the opportunity to avoid this issue.

In a matter resulting in death due to the already concluded negligence of Atlantic Richfield Company is it so much for petitioner to request that the appellate court agree to at least determine whether the district court committed error in the handling of this matter. Of course there is no question but that the evidence contained in the exhibits attached to the motion before the lower court should certainly have been permitted to be presented to a jury. *See Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512 (1957). Here we have the double problem of a district judge erroneously refusing to permit this case to proceed to a jury and an appellate court erroneously refusing to make the determination as to whether the district court committed error.

It is abundantly clear when viewed against the extensive backdrop of Supreme Court cases that a jury question is presented by these facts which requires a reversal of the lower court. At the very least, the Court of Appeals, should not be permitted to avoid its responsibility by a less than humanitarian application of their opinion in *Villar*. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1962).

## II.

## THE COURT BELOW ERRONEOUSLY APPLIED FED. R. CIV. P. 15(c) WHEN IT RECOGNIZED THAT PETITIONER WAS MISTAKEN IN FAILING TO JOIN CERTAIN PARTIES AND WHERE THE RESPONDENTS (ARCO MARINE AND ARCH TANKERS) ADMITTED THAT THEY HAD NOTICE OF THE SUIT WITHIN THE LIMITATIONS PERIOD AND WERE NOT PREJUDICED BY THIS MISTAKE.

Petitioner, based upon the initial investigation into the facts and circumstances of the decedent's death coupled with the evidence that employees of Atlantic Richfield Company were responsible for the death, brought suit against Atlantic Richfield Company alone. At the time suit was instituted petitioner was of the belief that Atlantic Richfield Company was the appropriate defendant in this suit. At the time of the institution of suit petitioner was obviously mistaken.

Subsequent to the filing of the complaint an answer on behalf of Atlantic Richfield Company alleged that the appropriate parties to the cause were Arch Tankers and Arco Marine. Although still acting under the mistaken belief that Atlantic Richfield Company was the only appropriate party, but relying upon the answer of the respondent, a lawsuit was instituted in the Northern District of California which was transferred to the Central District but not consolidated.

During the pendency of this lawsuit the attorney handling the case left the employ of petitioner's firm. She directed the postal authorities to forward all mail addressed to her to her home. As a result the firm did not receive notice of a pre-trial conference. No one attended on behalf of petitioner and the matter was subsequently dismissed for lack of prosecution. A significant period of time passed before counsel for petitioner received word of the dismissal. Accordingly, a motion to open the judgment was filed. This motion was denied on March 25, 1985. While the motion for opening the judgment was pending, respondent sought the dismissal of the case against Atlantic Richfield Company on the basis that Atlantic Richfield Company did not own, possess or control the vessel. At the hearing on that motion, leave was granted to petitioner's counsel to file an amended complaint under Rule 15(c) in order to name as additional defendants Arch Tankers and Arco Marine. An amended complaint was in fact filed and was immediately attacked by the additional defendants on the basis that the actions were barred against them by the statute of limitations and implicitly that Rule 15(c) was not applicable in these circumstances.

The defendants admitted that they were not prejudiced by the filing of the amended complaint. Similarly, they admitted that the action against them arose out of the same conduct that supported the initial claim against Atlantic Richfield Company. Their major contention, however, was that they were justified in believing that their failure to be sued originally was not a mistake, but rather a deliberate ploy or decision on the part of plaintiff's counsel not to sue them. In support of this contention they proffered the fact that they were in fact sued in an earlier case and that that case was dismissed and not reinstated. This contention offered by the vessel owners and adopted by the court makes no sense. How could the defendants argue that they seriously believed that they were in jeopardy of being sued when they actively sought to defeat the motion for reconsideration.

Further, what conceivable ploy could plaintiff have been engaged in.

The district court, based upon the argument of the defendant, ruled that Rule 15(c) was not applicable to this case and that the attempted amended complaint did not relate back. Accordingly, he dismissed the amended complaint under Rule 12 as being untimely filed.

This appeal therefore raises the narrow, but substantial issue, of the appropriate interpretation under a Federal Rule of Civil Procedure. As such, this appeal raises an issue which falls within the primary concern of this Court because of its special relationship to the appropriate handling and interpretation of the Federal Rules of Civil Procedure.

There is no question but that the suing of Atlantic Richfield Company alone arose as a result of a mistake on the part of petitioner. The district court, the appellate court and respondent admitted that fact. The appellate court, however, concluded that at some point after the filing of the complaint, the defendants were justified in believing that the failure to bring them upon the record was no longer a result of a mistake but a result of a conscious decision on the part of petitioner. Without justification for that conclusion, but by reaching for inferences which do not support that conclusion, the appellate court concluded that the defendants were justified in assuming their joinder was not due to a mistake.

That this subjective standard is impossible to apply was of no concern to the majority. That it assumed a state of facts which did not exist similarly did not deter the court. Apparently rewriting the Rule so as to make it apply only in such cases where the defendant had the right to assume that the mistake made originally continued up until the time of the proposed amendment, the court

affirmed the lower court's refusal to permit the amendment.

The fact that the defendants admitted no prejudice to them did not deter the appellate court in reaching this conclusion. Nor did the respondents at any time prove with any degree of certainty what their mental state was.

The opinion of the appellate court in this case as so aptly pointed out by the dissent is in violation of the letter of Rule 15(c), it flies in the face of legislative history of Rule 15(c) and further militates against the liberal purpose for which Rule 15(c) was promulgated.

The appeals court grounded its decision on the basis of this Court's recent decision in *Schiavone v. Fortune, a/k/a Time, Inc.*, ____ U.S. ____, 106 S. Ct. 2379 (1986). The appeals court misconstrued *Schiavone* and therefore permitted the district court's improper application of Rule 15(c) to stand.

"The purpose of Rule 15(c) is to prevent a statute of limitations from barring an action where the wrong party has been sued and where the correct party had sufficient notice of the commencement of the action." *Dutka v. Southern Railway Co.*, 92 F.R.D. 375, 377 (N.D. Ga. 1981). "Generally, relation back under Rule 15(c) is liberally allowed if the requirements for the application of the concept are met." *Id.*

In *Unicure, Inc. v. Thurman*, 97 F.R.D. 1, 4 (W.D.N.Y. 1982), the court expressed the principle as follows:

> The general purpose of Rule 15(c) is to permit an amended pleading which would otherwise be barred by the statue of limitations, provided that the original pleading gave fair notice of the general

> factual situation out of which the claim sought to be put forth in the amended pleading arises. *See* 3 *Moore's Federal Practice*, ¶15.15 [3], at 15-194. If adequate notice is provided by the original pleading, the purpose of the statute of limitations to require notice of a claim within a certain period of time has been satisfied.

In *Schiavone*, this Court declared that in order for an amendment naming additional parties to relate back to the filing of an original pleading pursuant to Rule 15(c), the following criteria must be met:

> (1) The basic claim must have arisen out of the conduct set forth in the original pleading;
>
> (2) The party to be brought in must have received such notice that it will not be
>
> (3) The party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
>
> (4) The second and third requirements must have been fulfilled within the prescribed limitations period.

106 S.Ct. at 2384. Importantly, respondents concede and the Court of Appeals so found that petitioner has met the first two requirements (6a). The first two parts of the test would seem logically to be the most important hurdles that a plaintiff would have to meet in order to have his amended complaint relate back. This is so because if the basic claim did not arise out of the conduct set forth in the original pleading, then plaintiff would merely be seeking to abrogate the relevant statute of limitations which would

be unfair to the defendants. Moreover, if a defendant would be prejudiced in maintaining its defense, then it would also seem unfair to allow plaintiff to have his amended complaint relate back. Neither of these problems concern us in the instant case.

With regard to the issue of a mistake in identity, a mistake must, of necessity, have occurred or Rule 15(c) would never apply at all. In *Swartz v. Gold Dust Casino, Inc.*, 91 F.R.D. 543, 547 (D. Nev. 1981), the court stated:

> As to Rule 15(c)'s requirement that the new defendant should have known that but for a mistake concerning identity, the action would have been brought against him, such a mistake ". . . exists whenever a party who may be liable for the actionable conduct alleged in the complaint was omitted as a party defendant."

Similarly in *Taliferro v. Costello*, 467 F. Supp. 33, 36 (E.D. Pa. 1979), the court stated:

> Rule 15(c)'s third requirement — in particular, the phrase "a mistake concerning the identity of the proper party" — is so worded as to suggest that the draftsmen were chiefly concerned with confusion as to the defendant's right name. But "[i]n view of the history of the application of Rule 15(c), the phrase 'a mistake concerning the identity of the party' should clearly not be read to limit its usefulness to cases of misnomer." 3 *Moore's Federal Practice* [4-.2] at 15-231 n. 14. Where an amendment seeks to add a new defendant, this aspect of Rule 15(c) seems designed to insure that prior to the expiration of the limitation period,

> the new defendant knew (or should have known) that his joinder was a distinct possibility. [Citation omitted.]

In the instant matter, the Court of Appeals agreed with petitioner that the "would have been brought against him" language of Rule 15(c) suggests that the inquiry regarding the existence of a mistake of identity should be limited to petitioner's state of mind as of the time the *initial* complaint was filed (7a). *See also,* Federal Rule of Civil Procedure 15 Advisory Committee Note (amendment relates back if party "knew or should have known that the action would have been brought against him *initially* had there not been a mistake concerning the identity of the proper party." (Emphasis added.) *Id.* However, the majority read *Schiavone* to mandate that in order for an amendment to relate back under Rule 15(c) the new defendants must know of the mistake not "within the prescribed period" as Rule 15(c) and *Schiavone* clearly state, but rather, that the *new defendants must know of the mistake all during the prescribed limitation period.* It is respectfully asserted that this is not the proper application of Rule 15(c).

The majority framed the issue correctly:

> The critical inquiry therefore is whether Arco Marine and Arch Tankers knew or should have known, within the statute of limitations period, that, but for a mistake, Kilkenny would have named them as defendants in the original complaint.

(7a). However, the majority went on to say:

> *Kilkenny may have been mistaken as to the identity*

> *of the proper defendants at the time she filed the original complaint,* but that is not the critical inquiry under Rule 15(c). We are concerned with what Arco Marine and Arch Tankers knew or should have known during the limitations period. Because Kilkenny failed to amend her complaint after being informed that Arco Marine and Arch Tankers were potential defendants and failed to prosecute the second action in which they were properly named, we conclude that Arco Marine and Arch Tankers cannot be found to have known during the relevant limitations period that they were not named as defendants in the initial complaint due to mistake.

(9a) (emphasis added).[2] The highlighted portion should have ended the inquiry; the appeals court, however, went on to create a new test which deviates from Congress' intent and prior case law. *Schiavone* clearly does not support this tortured result.[3]

The dissenting opinion of Judge Canby, also suggested that this result was neither dictated by the Rule nor by *Schiavone.* He found that:

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2. It must be recalled that petitioner's "failure to prosecute the second action" was by no means a tactical ploy. As explained *supra*, petitioner's counsel did not receive timely notice sent by the court concerning a hearing and the action was dismissed. Moreover, petitioner's subsequent attempt to reopen the action was denied.

3. In *Schiavone,* neither the original party nor the defendant sought to be added in the amended complaint, received notice of the lawsuit within the prescribed limitation period. Here of course, both Arco Marine and Arch Tankers received notice, undoubtedly through Arco when the original complaint was filed, but also through plaintiff's filing of her complaint against those two defendants in the District Court for the Northern District of California.

> There is no question in this case that Arco Marine and Arch Tankers had sufficient notice of the action that their defense of the merits would not be prejudiced. There is also no question that they received that notice within the applicable limitations period.

(15a-16a).

Judge Canby further stated that:

> [T]here can also be little question that Arco Marine and Arch Tankers knew, within a short time after the action was commenced, that a mistake had been made and that they should have been named as parties defendant.

*Id.* at 16a. Thus, notice of the action and of the mistake was given to Arco Marine and Arch Tankers long before limitations had expired. *Id.*[4]

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4. The statement of the court in *Schwartzwelder v. Hamilton*, 56 F.R.D. 606, 609-10 (M.D. Pa. 1972), is appropriate here:

> Moreover, neither long delay, nor the fact that the amendment is sought as an afterthought of counsel will be sufficient to deny leave to amend unless it can be said that the opposing party is prejudiced thereby. Green v. Wolf Corp., 50 F.R.D. 220 (S.D.N.Y. 1970); Smith v. Guaranty Service Corp., 51 F.R.D. 289 (N.D. Cal. 1970); Trotter v. Cone Automatic Machine Co., Inc., *supra* [48 F.R.D. 100 (E.D. Pa. 1969)].

In addition, there is no requirement that a plaintiff substitute a defendant sought to be added through Rule 15(c) in place of the original defendant, as a plaintiff may retain the original party as a necessary protection of her interests. *See*

(Cont'd)

Judge Canby further stated that:

> What the majority seems to be holding in practical effect is that knowledge of a mistake, once timely gained may be unlearned if the plaintiff permits an undue amount of time to pass before amending. The requirement of *Schiavone* that the new defendants know of the mistake "within the prescribed period" is changed a requirement that the new defendants know of the mistake *all during* the prescribed limitations period. The majority states that Arco Marine and Arch Tankers are entitled to conclude, after a period of delay, that they were omitted not because of mistake, but for some tactical reason. There is no suggestion what the tactical reason might be. If it was to forum-shop by the bringing of a separate action, that reason appeared long after the original mistake was apparent and terminated long before limitations ran. It is clear here from what the claim was and who should have been sued, and these facts were known to all parties, old and new, within weeks after the complaint was filed. There is no reason not to permit the action to continue against the proper defendants, as the rule permits. The intentions were mainfest when the action was commenced; the rules should be applied to

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(Cont'd)

*Merideth v. United Airlines*, 41 F.R.D. 34, 39 (S.D. Cal. 1966); *see also, Gabriel v. Kent General Hospital, Inc.*, 95 F.R.D. 391 (D. Del. 1982). In the latter case, the court held that relation back was permissible since there was "a possibility that the plaintiff may have made a mistake in selecting the *original* defendants." 95 F.R.D. at 396 (emphasis added).

> facilitate a decision on the merits. *See Foman v. Davis,* 371 U.S. 178, 181 (1962).

(17a).

This Court found in *Schiavone* that neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time. 106 S. Ct. at 2384. Notice to Time was a necessary element which did not come into being "within the period provided by law for commencing the action" as is required by Rule 15(c). This Court stated that it did not have a choice between a "liberal" approach toward Rule 15(c) on the one hand, and a "technical" interpretation of the Rule on the other. Instead, the choice was between "recognizing or ignoring what the Rule provides in plain language." *Id.* at 2385. The court accepted the rule as meaning what it says and therefore, the plaintiff had failed to satisfy the fourth requirement of the test.

Applying this same rationale to the instant action, it is clear that the plain language of Rule 15(c) states "that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it." Moreover, the Advisory Committee notes make it clear that the time of the mistake is when a plaintiff initially filed suit. It cannot be disputed that Arco Marine and Arch Tankers knew that a mistake had been made and that they should have been named as parties defendant. It also cannot be disputed that the time of the mistake was when the initial complaint was filed. Thus, just as this Court recognized in *Schiavone* the "plain language" of the Rule concerning the time knowledge came into being, so should this Court recognize the plain language of the Rule concerning a mistake in parties at the commencement of the action. *Schiavone* therefore supports petitioner's position as recognized by Judge

Canby in his dissent. To hold otherwise would create the anomalous situation where the plain language of portions of the Rule are followed, but the plain language of other portions of the Rule are not. Therefore, this Court should grasp the opportunity to avoid subsequent confusion in the application of Rule 15(c).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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**APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING FILED OCTOBER 27, 1986**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6404

D.C. No. CV 83-2602-JMI

GLORIA LEE WEISS MARMION KILKENNY, As Personal Representative of the Estate of Matthew Kane Marmion, Deceased,

Plaintiff-Appellant,

-vs-

ARCO MARINE INC., ARCO TANKERS INC., and S.S. ARCO ALASKA,

Defendants-Appellees.

ORDER

Appeal from the United States District Court for the Central District of California

Before: WALLACE, FARRIS, and CANBY, Circuit Judges.

Appellant's petition for rehearing is denied.

**APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 19, 1986**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6404

D.C. No. CV 83-2602-JMI

GLORIA LEE WEISS MARMION KILKENNY, As Personal Representative of the Estate of Matthew Kane Marmion, Deceased,

Plaintiff-Appellant,

-vs-

ARCO MARINE INC., ARCO TANKERS INC., and S.S. ARCO ALASKA,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
Argued and Submitted June 5, 1986
Pasadena, California

Before: WALLACE, FARRIS, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

*Appendix B*

Kilkenny appeals from the district court's dismissal of her amended complaint against Arco Marine, Inc. (Arco Marine) and Arch Tankers, Inc. (Arch Tankers) and entry of summary judgment in favor of Atlantic Richfield Company (Atlantic Richfield). Kilkenny contends that the district court erred in dismissing the amended complaint based on its conclusion that the amended complaint was barred by the relevant statute of limitations because it did not relate back to the date of the filing of her original complaint, and in granting summary judgment because there is a genuine issue of material fact concerning Atlantic Richfield's involvement in the events giving rise to Kilkeny's complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

On December 26, 1981, Matthew Marmiom, a licensed diver employed by a commercial diving company, died as a result of injuries suffered while performing underwater maintenance work on the supertanker *Arco Alaska*. In November 1982, Kilkenny, the personal representative of Marmiom's estate, brought suit in the United States District Court for the Eastern District of Pennsylvania against Atlantic Richfield to recover damages pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law. Atlantic Richfield answered the complaint, stating that the *Arco Alaska* was owned by Arch Tankers and operated by Arco Marine. Atlantic Richfield then successfully moved in December 1982 to transfer the case to the United States District Court for the Central District of California.

The next month, January 1983, Kilkenny instituted a parallel action in the United States District Court for the Northern District of California, naming Atlantic Richfield, Arco Marine, and Arch

Tankers as defendants. This second action was also transferred to the United States District Court for the Central District of California. In March 1984, the district judge assigned the second action dismissed it for lack of prosecution.

In January 1985, Atlantic Richfield moved for summary judgment in the first action on the grounds that there was no genuine issue of material fact that it did not own, operate, manage, possess, or control the *Arco Alaska,* and thus could not be held liable for Marmiom's accidental death. Reacting to Atlantic Richfield's motion for summary judgment, Kilkenny moved to vacate the dismissal of the second action pursuant to rule 60(b), Fed. R. Civ. P., but the district judge that had dismissed the second action denied the motion. On July 24, 1985, Kilkenny filed an amended complaint in the first action, adding Arco Marine and Arch Tankers as defendants.

The district court heard oral argument on Atlantic Richfield's motion for summary judgment in the first action and granted the motion. Arco Marine and Arch Tankers then filed a motion to dismiss the amended complaint in the first action pursuant to rule 12, Fed. R. Civ. P., contending that the amended complaint was barred by the three-year statute of limitations that applies to actions under the Jones Act, *see* 46 U.S.C. § 688; 45 U.S.C. § 56, and that the amended complaint did not "relate back" to the date of the original complaint as required by rule 15(c), Fed. R. Civ. P. The district judge found that Kilkenny knew the identity of the proper defendants before the statute of limitations expired, that the failure to amend the original complaint prior to the expiration of the limitations period was not the result of a mistake concerning the identity of the proper defendants, and, as a result, that the amended complaint did not relate back to the filing of the original complaint and thus was barred by the statute of

limitations. The district judge therefore granted Arco Marine's and Arch Tankers's motion to dismiss the amended complaint. The action was subsequently dismissed.

II

We first consider whether we have jurisdiction to consider this appeal. The district court's entry of summary judgment against Kilkenny and in favor of Atlantic Richfield was not a final order because parties to the action remained. After orally granting Arco Marine's and Arch Tankers's motion to dismiss, and entering findings of fact and conclusions of law dismissing Kilkenny's amended complaint, the district judge failed to enter a final order dismissing the action. "Ordinarily an order dismissing a complaint but not dismissing the action is not appealable under section 1291 unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint. If it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1171 n.1 (9th Cir. 1984) (citation omitted). The district judge made it very clear that Atlantic Richfield was not a proper party to the action and that Kilkenny now is unable to amend her complaint to add the proper parties. We conclude therefore that we should treat the district court's order dismissing Kilkenny's amended complaint as a final order dismissing the action and that we have jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291.

III

Kilkenny does not dispute the district court's determination that she filed the amended complaint after the three-year statute of limitations period had expired. She contends that the district

court erred in concluding that the amended complaint did not relate back to the filing of the original complaint. We review the district court's decision that the amended complaint did not relate back for abuse of discretion. *See Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1399 (9th Cir. 1984) (*Korn*).

A.

Because the statute of limitations period expired prior to Kilkenny's filing of the amended complaint, rule 15(c), Fed. R. Civ. P.,[1] is the only procedural avenue by which Kilkenny's original complaint may be amended to add additional parties. *Korn*, 724 F.2d at 1399. The Supreme Court recently identified four criteria that must be met in order for an amendment naming additional parties to relate back to the filing of an original pleading pursuant to rule 15(c):

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

*Schiavone v. Fortune, aka Time, Inc.*, 106 S. Ct. 2379, 2384 (1986) (*Schiavone*). Arco Marine and Arch Tankers concede that Kilkenny has met the first two requirements. We are concerned only with the third and fourth requirements.

*Appendix B*

The district judge found, based on the fact that Atlantic Richfield provided Kilkenny with the names of Arco Marine and Arch Tankers as potential defendants in its answer to the initial complaint and on the fact that Kilkenny named them in her second action, that Kilkenny was not mistaken concerning the identity of the proper parties. Kilkenny contends, however, that the district judge erred in failing to limit his inquiry of whether she was mistaken concerning the identity of the proper defendants to the time of the filing of her original complaint. We agree with Kilkenny that the "would have been brought against him" language of rule 15(c) suggests that our inquiry regarding the existence of a mistake of identity should be limited to her state of mind as of the time the initial complaint is filed. *See also* Fed. R. Civ. P. 15 advisory committee note (amendment relates back if party "knew or should have known that the action would have been brought againt him *initially* had there not been a mistake concerning the identity of the proper party") (emphasis added).

The district judge did not err, however, in concluding that the amended complaint did not relate back to the filing of the original complaint based on the information Kilkenny received during the limitations period of the proper parties. In *Schiavone*, the Supreme Court rejected the argument that, for rule 15(c) purposes, notice of a claim need not be received by the party that plaintiff seeks to add by way of amendment prior to the expiration of the relevant statute of limitations period. The Court emphasized that under rule 15(c), "the emphasis is upon 'the period provided by law for commencing the action against' the defendant." *Id.* at 2385, *quoting* Fed. R. Civ. P. 15(c). The Court specifically concluded that in order for an amendment to relate back under rule 15(c), the party to be brought in must have known or should have known, *within the relevant statute of limitations period,* that, but for a mistake concerning identity, the action

would have been brought against it. *See id.* at 2384-85. The critical inquiry therefore is whether Arco Marine and Arch Tankers knew or should have known, within the statute of limitations period, that, but for a mistake, Kilkenny would have named them as defendants in the original complaint.

B.

The extent of information Kilkenny received by Arco Marine and Arch Tankers as potential defendants after filing her original complaint and before the limitations period expired, is relevant to the detrmination of whether Arco Marine and Arch Tankers knew or should have known during the limitations period that they would have been named in the initial complaint but for a mistake of identity. For example, in *Upshaw v. Equitable Life Assurance Society*, 85 F.R.D. 674 (E.D. Ark. 1980), the plaintiff received notice from the named defendant's answer to his complaint of the existence of an additional indispensable defendant two months after filing his complaint, but did not attempt to add the additional defendant until after the applicable statute of limitations had expired. *Id.* at 675. The court concluded that the previously unnamed defendant

> should not, in the face of the plaintiff's inaction during the limitations period, be held thereafter to know that but for a mistake in identity it would be joined as a party, particularly when [the named defendant] had informed the plaintiff of the proper party and noted its indispensability well before the limitations period had run.

*Id.* at 678. A plaintiff's failure to amend its complaint to add a defendant after being notified of a mistake concerning the

identity of a proper party therefore may cause the unnamed party to conclude that it was not named because of strategic reasons rather than as a result of the plaintiff's mistake. *See, e.g., Unicure, Inc. v. Thurman*, 97 F.R.D. 1, 6 (W.D.N.Y. 1982) (*Unicure*); *Rogatz v. Hospital General San Carlos, Inc.*, 89 F.R.D. 298, 301 (D.P.R. 1980); *Gutierrez v. Raymond International, Inc.*, 86 F.R.D. 684, 685 (S.D. Tex. 1980) (*Gutierrez*).

Atlantic Richfield notified Kilkenny that Arco Marine and Arch Tankers were potential defendants three weeks after Kilkenny filed her original complaint. Kilkenny never attempted to amend her complaint to add Arco Marine and Arch Tankers as defendants before the three-year statute of limitations period expired in December 1984. Kilkenny obviously knew that Arco Marine and Arch Tankers were potential defendants because she named them in her complaint in the second action. No effort was made to amend the complaint even during the nine-month period after the second action was dismissed and before the statute of limitations ran. Kilkenny may have been mistaken as to the identity of the proper defendants at the time she filed the original complaint, but that is not the critical inquiry under rule 15(c). We are concerned with what Arco Marine and Arch Tankers knew or should have known during the limitations period. Because Kilkenny failed to amend her complaint after being informed that Arco Marine and Arch Tankers were potential defendants and failed to prosecute the second action in which they were properly named, we conclude that Arco Marine and Arch Tankers cannot be found to have known during the relevant limitations period that they were not named as defendants in the initial complaint due to mistake.

Rule 15(c) was intended to protect a plaintiff who mistakenly names a party and then discovers, after the relevant statute of

limitations has run, the identity of the proper party. Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party, nor was it intended to permit a plaintiff to engage in piecemeal litigation. *Unicure,* 97 F.R.D. at 6; *Gutierrez,* 86 F.R.D. at 685-86.

The district court's finding that Kilkenny was not mistaken as to the proper parties during the limitations period amply supports our conclusion that Arco Marine and Arch Tankers lacked the requisite knowledge under rule 15(c). We conclude that the district court did not abuse its discretion in concluding that Kilkenny's amended complaint did not relate back to the filing of the original complaint. Therefore, the district court did not err in dismissing the amended complaint.

IV

Kilkenny next argues that the district court erred in granting summary judgment in favor of Atlantic Richfield. We review the district court's entry of summary judgment de novo and will affirm if, after reviewing the record in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Continental Casualty Co. v. City of Richmond,* 763 F.2d 1076, 1078-79 (9th Cir. 1985); *Nevada v. United States,* 731 F.2d 633, 635 (9th Cir. 1984).

In the district court, Kilkenny advanced two legal theories as a basis for recovery against Atlantic Richfield: first, that Atlantic Richfield owned, operated, managed, possessed, and controlled the *Arco Alaska*; and second, that Atlantic Richfield so dominated Arco Marine and Arch Tankers that the court should "pierce the corporate veil" to impose liability on Atlantic Richfield. At

oral argument, Kilkenny attempted to argue vicarious liability as a third basis for recovery. We do not consider, absent exceptional circumstances, arguments raised for the first time on appeal. *See Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1483 (9th Cir. 1986). We do not decide whether there could have been a genuine issue of material fact with respect to a claim of vicarious liability.

In support of its motion for summary judgment, Atlantic Richfield introduced the *Arco Alaska*'s certificate of registry which listed Arch Tankers as the owner of the vessel; a declaration by the assistant secretary of Atlantic Richfield stating that Atlantic Richfield did not own or operate the *Arco Alaska* or employ anyone who worked on the vessel; and a declaration by the assistant secretary of Arco Marine stating that Arco Marine was earlier called Arch Tankers and that Arco Marine owned, operated, and managed the *Arco Alaska* and employed all individuals who rendered services on behalf of the vessel.

In opposition to Atlantic Richfield's motion for summary judgment, Kilkenny introduced a report of Marmiom's accident prepared by a Coast Guard investigating officer listing Atlantic Richfield as the operator of the *Arco Alaska*; letters from the manager of Atlantic Richfield's Marine Transportation Division advising Hale, one of those charged with negligence which resulted in Marmiom's death, of his selection as a chief engineer and of his work assignment on a different vessel; an order for and invoices for maintenance work on the *Arco Alaska* billed to "Atlantic Richfield's Company, Marine Department," "Arco," and "Arco Marine Dept."; disbursement vouchers from Atlantic Richfield representing payment for maintenance work on the *Arco Alaska*; testimony of two *Arco Alaska* crewmen stating that they worked for "ARCO" and "Atlantic Richfield, Long Beach, California" respectively; and an inspection report listing Atlantic Richfield as the operator of the *Arco Alaska*.

*Appendix B*

A.

We first determine whether these facts present a genuine issue of material fact with respect to Kilkenny's argument that Atlantic Richfield owned and operated the *Arco Alaska*. The *Arco Alaska*'s certificate of registry lists Arch Tankers as the owner, and the Coast Guard report and the inspection report list "Arco Tankers, Inc." as the owner. We are not persuaded that the maintenance invoices and disbursement vouchers suggest a contrary conclusion. We conclude therefore that there is no genuine issue of material fact concerning the ownership of the *Arco Alaska*.

We next consider whether there is a genuine issue of material fact concerning Atlantic Richfield's involvement in the operation and management of the *Arco Alaska*. Kilkenny relies on the Coast Guard report and the inspection report, both of which list Atlantic Richfield as the "operator" of the *Arco Alaska*, to demonstrate a genuine issue of material fact. In neither the Coast Guard report nor the inspection report, however, was the technical question of corporate identity of critical concern. The testimony of the two crewmen also does not reflect consideration of the separate corporate identities or management of Atlantic Richfield and Arco Marine. We conclude that the evidence presented by Kilkenny fails to raise a genuine issue of material fact concerning whether Atlantic Richfield was involved in the operation and management of the *Arco Alaska*.

B.

Kilkenny also contends that her second theory of recovery based on the alter ego doctrine of corporate liability presented a genuine issue of material fact. We disagree. The alter ego doctrine requires that the controlling corporate entity exercise " 'total

domination of the subservient corporation, to the extend that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.' " *Baker v. Raymond International, Inc.*, 656 F.2d 173, 181 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982), *quoting Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *reh'g denied*, 490 F.2d 916 (5th Cir. 1974). Corporate separateness is respected unless doing so would work injustice upon an innocent third party. *Edwin K. Williams & Co. v. Edwin K. Williams & Co. - East*, 542 F.2d 1053, 1063 (9th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *see Laborers Clean-up Contract Ad Trust Fund v. Uriarte Clean-up Service, Inc.*, 736 F.2d 516, 524-25 (9th Cir. 1984).

The only facts set forth by Kilkenny in support of her alter ego argument were that some of Arco Marine's expenses were paid through Atlantic Richfield, that two crew members of the *Arco Alaska* stated they were employees of "Arco" and "Atlantic Richfield, Long Beach, California," and that the business of the *Arco Alaska* consisted of transporting products on behalf of a division of Atlantic Richfield. We conclude that these facts do not approximate the required proof of total domination of the subservient corporation by the controlling corporation and thus do not present a genuine issue of material fact concerning whether Arco Marine is an alter ego of Atlantic Richfield. Moreover, Atlantic Richfield, Arco Marine, and Arch Tankers have not attempted to mislead Kilkenny as to the proper corporate entity to be named in her complaint. Any injustice that might occur results from Kilkenny's inexcusable failure to heed Atlantic Richfield's disclosure of the proper party during the limitations period rather than from the forms of corporate organization and management adopted by the defendants.

AFFIRMED.

*Appendix B*

FOOTNOTE

1. Rule 15(c) provides that

> [a]n amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

*Appendix B*

*KILKENNY V. ARCO MARINE, INC. - No. 85-6404*

CANBY, Circuit Judge (dissenting in part):

I understand the appeal of the majority's decision that Rule 15(c) is not to be brought to the aid of an attorney who inexplicably fails to correct a pleading within a reasonable time after being notified that he has sued the wrong party. But the result is a harsh one for the client, and it is dictated neither by the Rule nor by the Supreme Court's decision in *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986). There is no suggestion of prejudice to the new defendants. I therefore would permit the relation back.

The books are replete with cases in which a court finds itself required to reach a harsh result, based on a technicality, because the express language of a rule or statute permits no other outcome. *See, e.g., Schiavone,* 106 S.Ct. at 2385. Here, however, the language of the Rule favors the more humane and equitable result. I would not resist it.

Rule 15(c) provides for relation back if:

> within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

There is no question in this case that Arco Marine and Arch

*Appendix B*

Tankers had sufficient notice of the action that their defense of the merits would not be prejudiced. There is also no question that they received that notice within the applicable limitations period. All of the elements of requirement (1) of Rule 15(c) were therefore met. The majority opinion concedes as much.

There can also be little question that Arco Marine and Arch Tankers knew, within a short time after the action was commenced, that a mistake had been made and that they should have been named as parties defendant. The majority opinion holds, however, that requirement (2) of Rule 15(c) has not been fully met because Arco Marine and Arch Tankers did not know of this mistake "within the prescribed limitations period," as required by *Schiavone,* 106 S.Ct. at 2384. That result can be reached only by a most unlikely interpretation of the Rule and of the *Schiavone* gloss upon it.

*Schiavone* dealt with a situation in which neither the "right" nor the "wrong" defendant was given notice of the commencement of the action or of the mistake in identity until *after* limitations has run. Here, however, notice of the action and of the mistake was given to Arco Marine and Arch Tankers long before limitations had expired. The majority opinion seems to agree that if an amendment had been made promptly, it would have related back; all of the conditions had been met.

What the majority seems to be holding in practical effect is that knowledge of a mistake, once timely gained, may be unlearned if the plaintiff permits an undue amount of time to pass before amending. The requirement of *Schiavone* that the new defendants know of the mistake "within the prescribed period" is changed to a requirement that the new defendants know of the mistake *all during* the prescribed limitations period. The

majority states that Arco Marine and Arch Tankers are entitled to conclude, after a period of delay, that they were omitted not because of mistake, but for some tactical reason. There is no suggestion what the tactical reason might be. If it was to forum-shop by the bringing of a separate action, that reason appeared long after the original mistake was apparent and terminated long before limitations ran.

It is clear here what the claim was and who should have been sued, and these facts were known to all parties, old and new, within weeks after the complaint was filed. There is no reason not to permit the action to continue against the proper defendants, as the Rule permits. The intentions were manifest when the action was commenced; the Rules should be applied to facilitate a decision on the merits. *See Foman v. Davis,* 371 U.S. 178, 181 (1962). I therefore dissent from the majority's refusal to permit a relation back.

In all other respects, I concur in the majority opinion.

**APPENDIX C—FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISMISSAL FILED NOVEMBER 6, 1985**

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ARCO MARINE, INC. and ARCH TANKERS, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-2602-JM

GLORIA LEE WEISS MARMION KILKENNY, Personal Representative of the Estate of MATTHEW KANE MARMION, deceased,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISMISSAL

*Appendix C*

The Court, has considered defendant's Motion to Dismiss, plaintiff's opposition to that Motion, Defendant's Reply, the oral arguments of counsel made at the hearing of October 21, 1985, the files and records of this case and makes the following findings of fact and conclusions of law:

1. Plaintiff's First Amended Complaint, filed July 24, 1985 seeks to add Arco Marine, Inc. and Arch Tankers as party defendants.

2. Unless the First Amended Complaint "relates back" to the date of the original Complaint, the applicable statute of limitations in this case expired prior to the filing of the First Amended Complaint.

3. Rule 15(c), Federal Rules of Civil Procedure governs the relation back of amended pleadings which seek to add or change the parties involved in a case.

4. One of the criteria which the party seeking to add defendants after the statute of limitations has expired must satisfy to permit relation back of the amended pleading is that the amending party must have made a mistake concerning the identity of the proper defendants.

5. In its Answer to the original Complaint dated November 23, 1982, defendant Atlantic Richfield, previously granted summary judgment, specifically informed plaintiff of the identity of the proper party defendants, Arco Marine, Inc. and Arch Tankers, Inc.

6. Similarly, in its Motion for Change of Venue filed on December 25, 1982, in the Eastern District of Pennsylvania,

Atlantic Richfield again specifically informed plaintiff of the identity of the proper party defendants.

7. On January 11, 1983, plaintiff instituted a parallel action based on same facts as those which underly this case in the U.S. District Court for the Northern District of California. In that action, plaintiff name Arco Marine, Inc. and Arch Tankers, Inc. as defendants.

8. In light of the specific notice of the proper party defendants given twice to plaintiffs by Atlantic Richfield and the subsequent inclusion of those defendants in the parallel action, the Court finds and concludes that the plaintiffs knew the identity of the proper party defendants well before the expiration of the statute of limitations, and that the failure to amend the pleadings within the statute of limitations period to include the moving parties as defendants was not a result of a mistake concerning the identity of the proper party defendants.

9. Therefore, the court finds and concludes that plaintiff's First Amended Complaint does not meet the criteria of Rule 15(c), Federal Rules of Civil Procedure, and the date of the filing of the First Amended Complaint does not "relate back" to the day of the original Complaint.

10. Because the date of the filing of the First Amended Complaint does not relate back to the date of the original Complaint, and because the First Amended Complaint was filed after the expiration of the applicable statute of limitations, the Court finds and concludes that plaintiff's action against defendants Arco Marine, Inc. and Arch Tankers, Inc. is barred by the statute of limitations.

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11. The Motion to Dismiss of defendants Arco Marine, Inc. and Arch Tankers, Inc. granted and the First Amended Complaint ordered dismissed.

DATED: 5 November 1985 s/ James M. Ideman
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
Lillick, McHose & Charles

By: s/ Alan Rubin
Alan Rubin

179:pld015

## APPENDIX D—JUDGMENT FILED JULY 30, 1985

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ATLANTIC RICHFIELD COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2602-JMI

GLORIA LEE WEISS MARMION MILKENNY, Personal Representative of the Estate of MATTHEW KANE MARMION, Deceased,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY,

Defendant.

### JUDGMENT

The Court, having considered all the evidence presented, hereby finds as follows:

1. The Court has jurisdiction over the subject matter of the Complaint and over the parties hereto.

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2. Defendant is not the proper party in this action.

3. Defendant is entitled to a judgment in accordance with the Uncontroverted Facts and Conclusions of Law.

GOOD CAUSE APPEARING THEREFOR, IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of defendant Atlantic Richfield Company and against plaintiff Gloria Lee Weiss Marmion Kilkenny, personal representative of the Estate of Matthew Kane Marmion, deceased, and that plaintiff shall take nothing by her Complaint.

Defendant shall be entitled to costs of suit.

DATED: July 24, 1985.

s/ James Ideman
UNITED STATES DISTRICT JUDGE

## APPENDIX E — UNITED STATES COAST GUARD INVESTIGATIVE REPORT

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

Commanding Officer
Marine Safety Office
165 N. Pico Avenue
Long Beach, CA 90802

16732/C-82-217
MAY 31 1983

From: Investigating Officer
TO: Commandant (G-MMI-I)
Via: Commanding Officer, CG Marine Safety Office LA-LB

Subj: ARCO ALASKA O/N 614 544; death of MARMION, Matthew K. on 26 December 1981 in the Pacific Ocean at Long Beach Harbor, San Pedro Bay, California while diving in the starboard sea chest

1. On 26 December 1981, at approximately 1500, Matthew K. MARMION and Robert A. LUCARIELLO, commercial divers employed by Ocean Masters International, entered the water to commence cleaning the starboard sea chest of the SS ARCO ALASKA O/N 614 544. The SS ARCO ALASKA a Tankship certificated by the U.S. Coast Guard, was anchored at Long Beach Outer Anchorage D-5 with the uninspected M/V OCEAN MASTER O/N 635 420, moored alongside to starboard for use as a diving platform. At approximately 1520, 26 December 1981, Matthew K. MARMION died as a result of traumatic asphyxiation after becoming caught in the starboard sea chest of the SS ARCO

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ALASKA. All times in this report are +8.

2. Vessel Data:

| | | |
|---|---|---|
| a. | Name | ARCO ALASKA |
| | Official Number | 614 544 |
| | Service | Tankship |
| | Gross Tons | 83,675 |
| | Net Tons | 73,111 |
| | Length | 925.9' |
| | Breadth | 144' |
| | Depth | 71' |
| | Mean Draft 12/26/81 | 30' |
| | Propulsion | Steam |
| | Horse Power | 28,000 |
| | Owner | Arco Tankers, Inc.<br>Los Angeles, CA |
| | Operator | Atlantic Richfield Company<br>Los Angeles, CA |
| b. | Name | OCEAN MASTER |
| | Official Number | 635 420 |
| | Service | Fishing |
| | Gross Tons | 13 |
| | Net Tons | 9 |
| | Length | 34' |
| | Breadth | 10.8' |
| | Depth | 5.1' |
| | Propulsion | Diesel |
| | Horsepower | 300 |
| | Home Port | Los Angeles/Long Beach |
| | Owner | Chester J. Hummel |

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3. The weather at the time of the casualty was not a factor. The air temperature was 70 and sea temperature was approximately 58°. Visibility underwater was 2-3' except for 5' with the aid of flashlights. When sediment was stirred up by the divers, the visibility was reduced to zero.

4. Dead as a result of the casualty is Matthew K. MARMION, — He was survived by his parents Fenton and Gloria Kilkenny of —. Marmion's remains were taken to McNerney's Mortuary in San Pedro, CA and cremated on 29 December 1981. His remains were then scattered at sea on 30 December 1981.

5. Matthew K. MARMION was in good health and was certified by Commercial Diving Center of Wilmington, CA at a 32 week Professional Divers Course which he had completed on 4 December 1980. He had made approximately 15 dives commercially. Prior to December 1980, Mr. Marmion had 2 years scuba diving experience.

6. Matthew Marmion's diving equipment consisted of a full wetsuit, a Kirby Morgan KMB-10 BAND MASK. Surface air supplied by a Quincey 216 air compressor, which develops 12-13 cubic feet of air per minute. Following the fatal dive, the mask was sent to an independent diving safety consultant and found the mask to be capable of sufficient air flow to sustain a diver. The purge valve system of the regulator was damaged during the fatal dive so that when depressed, it would not allow air to enter the regulator.

7. At 0900, 26 December 1981, Marmion was given a briefing on the day's dive by Mr. Ken Jenkins of Ocean Masters International, the designated diving supervisor. Another diver, Robert Lucariello accompanied Mr. Marmion and Mr. Jenkins

on their vessel, M/V OCEAN MASTER, which departed their dock in Los Angeles Harbor at 1030. At 1100, the vessel OCEAN MASTER came alongside the SS ARCO ALASKA and Jenkins went on board.

8. Jenkins spoke with the Chief Engineer, Walton S. Hale, License No. 479 948, at this time about the upcoming dive. Jenkins completed and signed a ship repair safety checklist and had the Chief Engineer sign the form. The form states that the main condensers would be closed and only the small 3'' suction would be on in the starboard main sea chest, the area where the divers were to work. The Chief Engineer told the night engineer in the engine room that the divers would be working under the ship, but never said the divers would be entering the starboard main sea chest.

9. Jenkins returned to his vessel and waited for a supply boat to complete loading stores to the ARCO ALASKA. The supply vessel, VICKY ANN was on the ARCO ALASKA's starboard side, making it impossible for the OCEAN MASTER to tie up over the starboard sea chest.

10. At 1330, Jenkins returned to the ARCO ALASKA to tell the Chief Engineer of his plans to start diving. The Chief Engineer could not be found, so he talked to the engine room watch engineer. The night engineer, Luther Weaver, told Jenkins that the equipment running in the engineroom was the same as before, that the suctions operating at that time were necessary to be kept on. Mr. Weaver was still unaware that divers would be entering the sea chest itself.

11. Jenkins did not ascertain the status of any suctions in the starboard main sea chest while in the engineroom. At 1400, Jenkins

returned to his dive platform vessel, OCEAN MASTER. At 1410, he entered the water, opened the center grate and entered the starboard main sea chest. He determined the extent of sea growth inside the sea chest. Jenkins surveyed the sea chest from inside the centergrate and found no unusual movement of water, or water going into the main suction lines. In Mr. Jenkins mind, there posed no unusual danger to divers entering the sea chest. It is not known if Mr. Jenkins dove all the way to the aft end of the sea chest to check for movement of water at the opening for number 2 auxiliary circulator suction line.

12. At 1500, Jenkins had his two divers enter the water and descent 15 feet to enter the starboard sea chest for cleaning. Lucariello noticed no movement of water in the starboard sea chest in the area he was working at the ship's frame 85. At 1520, Jenkins lost voice communications with Marmion, and instructed Lucariello to find Marmion, and determined what happened to him. Lucariello found Marmion at the after end of the sea chest with his head inside a 12" suction line at frame 93. Lucariello found Marmion motionless and attempted to pull him out of the suction line. Luciarello called Jenkins, and Jenkins radioed the ARCO ALASKA to stop all sea suctions.

13. Luciarello surfaced and was instructed to dive once more to try and get Marmion out of the sea chest. Mr. Luciarello was unsuccessful. At 1535, after being called by Mr. Jenkins, the engineer on watch secured all pumps in the engineroom.

14. At 1600, Long Beach rescue divers arrived and were briefed on the location of Mr. Marmion. The rescue divers entered the sea chest, located Mr. Marmion approximately eight feet into the chest, and then ascended with Mr. Marmion to the surface at 1610. He was placed on the Long Beach Rescue Boat, given CPR

by the rescue divers, but he did not respond. He then was evacuated to Saint Mary's Hospital in Long Beach, CA by Long Beach Paramedics, where he was pronounced dead on arrival.

15. After the diver was evacuated, at approximately 1715, Mr. Jenkins returned to the starboard sea chest to retrieve the diver's tools. At that time, the auxiliary circulator pumps No. 1 and No. 2 were on and Mr. Jenkins states that he felt a movement of water when he entered the center grate of the sea chest. Mr. Jenkins returned to the sea chest to secure the grates. He noticed that while inside the sea chest to retrieve the divers tools, he could feel a suction force present.

16. The engineering log for the SS ARCO ALASKA for 26 December 1981 shows that at 1520, during the 1200-1600 watch, the following equipment was running affecting the starboard sea chest: The No. 1 and No. 2 auxiliary circulating pumps feeding the No. 1 and No. 2 turbine generators by means of 2-12" suction lines. The auxiliary circulating pumps draw at a rate of 2150 g.p.m.. The IGS system deck seal pump also takes suction on the sea chest and has a 3" suction line and has a negligible flow rate. On going work was being completed installing a chloropac injection system for the starboard sea chest. During the day of 26 December 1981, shoreside machinists were contracted to tap into the auxiliary circulating pump suction piping for salt water injection. To enter these suction lines, it was required to stop the auxiliary circulating pumps, one at a time, which would then change the suction flow in the starboard main sea chest. This installation of the chloropac system was completed prior to 1200.

17. On 30 December 1981, the diving company of Ocean Masters International sent Marmion's diving mask to Mr. Thomas Thompson, a diving officer with the University of California,

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Irvine and Special Program Director and Diving Safety Officer with the Commercial Diving Center in Wilmington, CA. He noted that the rubber hood had a tear in the material on the left side of about five inches in length. The free flow adjustment shaft at the front of the mask was bent out, the regulator box was bent out of round and the diaphram of the regulator was sticking out of the regulator box about one quarter of an inch in one area. Air was attached to the mask to test all air systems, and all functioned satisfactory. It was found out that the exhaust valve of the regulator was folded back into the regulator. This condition would have made it impossible for the mask to be worn since water would enter the mask through this exhaust valve. Therefore, the mask was damaged after the diver had entered the water, according to Mr. Thompson.

18. An autopsy was performed on Matthew Marmion on 27 December 1981 by the Los Angeles County Coroner's office. The cause of death was determined to be traumatic asphyxia.

CONCLUSIONS

1. The apparent cause of the casualty was Matthew K. MARMION getting caught against a 12" suction line in the SS ARCO ALASKA's starboard main sea chest.

2. On 26 December 1981, at approximately 1530, Matthew K. MARMION died as a result of traumatic asphyxiation.

3. Had the Chief Engineer, Walton Scott Hale, insured that the Ship Safety Repair Checklist accurately described the condition of the sea chest, in that only a 3" suction line was operating in the starboard sea chest, the casualty would have been averted.

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4. Contributing to the casualty was the failure of the dive supervisor to ascertain the exact condition of all sea chest suctions prior to having his divers enter the starboard sea chest.

5. Also contributing to the casualty was the Chief Engineer's failure to instruct the night engineer on watch that divers would be inside the starboard sea chest.

6. There is evidence of negligence on the part of the SS ARCO ALASKA's Chief Engineer, Walton Scott Hale, License No. 479 948.

7. With the exception of the above, there is no evidence of actionable misconduct inattention to duty, negligence or willful violation of laws or regulations on the part of licensed or certificated personnel.

RECOMMENDATIONS

1. It is recommended that further investigation under the suspension and revocation proceedings be initiated in the case of Walton S. Hale, Chief Engineer of the SS ARCO ALASKA, concerning his part in this casualty.

2. It is recommended that a copy of this report be furnished to all commercial diving companies that may normally enter vessel's sea chests.

3. It is recommended that the diving personnel and ship engineers representative be in constant communications by radio.

4. Just prior to any dive under a vessel, it is recommended that a meeting of divers and ships personnel be conducted to ascertain

exact conditions the divers will encounter.

5. It is recommended that the casualty aspect of this matter be closed with the submission of this report.

s/ G.S. Johnson
G.S. Johnson

Encl:

(1) CG - 924E, SS ARCO ALASKA
(2) Diagram of SS ARCO ALASKA sea chest frame 85-93; starboard side
(3) SS ARCO ALASKA engineroom log for 26 December 1981.
(4) Copy of Ship repairs checklist of Ocean Masters International, Inc.
(5) Death Certificate of Matthew K. MARMION
(6) Autopsy report of Death of Matthew K. MARMION
(7) Photographs of Kirby KMB-10 surface air mask used by, Matthew K. MARMION on 26 December 1981.

FIRST ENDORSEMENT ON IO, MSO (LA-LB) RPT 16732/C-81-217

From: Commanding Officer, CG Marine Safety Office (LA-LB)
To: Commandant (G-MMI-I)

Subj: SS ARCO ALASKA O/N 614 544; death of MARMION, Matthew K. on 29 December 1981 in the Pacific Ocean at Long Beach Harbor, San Pedro Bay, California while diving in the starboard sea chest

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1. Forwarded, approved.

2. There is evidence of negligence on the part of Walton S. HALE, chief engineer aboard the SS ARCO ALASKA.

3. Further investigation under the Suspension and Revocation Proceedings has been initiated in the case of Walton S. HALE concerning his part in the casualty.

s/ J. H. Guest
J.H. GUEST

## APPENDIX F—EXCERPT OF TRANSCRIPT OF PROCEEDINGS BEFORE HONORABLE JAMES M. IDEMAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JAMES M. IDEMAN, JUDGE PRESIDING

NO. CV 83-2602-JMI
VOLUME A

GLORIA LEE WEISS MARMION KILKENNY,

PLAINTIFF,

VS.

ATLANTIC RICHFIELD, ET AL.,

DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, FEBRUARY 11, 1985

RUANNE MC ARTHUR, CSR 2699
OFFICIAL COURT REPORTER
442 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 687-3551

[Commencing at page A-7]

. . .parent corporation to be liable for the

subsidiary's act, the parent company's control has to amount to total domination over the subsidiary.

MR. LOCKARD: Well, Your Honor, it's a secondary argument that we can pierce the corporate veil. The first argument is that we belong in here because Arco is the proper defendant.

For example, the check—an Atlantic Richfield check was used to pay for, what was it, Ocean Master's International.

Arco indicated to us that they were the proper parties with whom to discuss settlement.

At the hearing before the Administrative Law Judge there was testimony that the persons who were responsible for the negligent acts, Mr. Weaver, Mr. Hale were employees of Atlantic Richfield, not even Arco Marine.

So that we don't need Arco Marine in order to proceed in this matter. It would be nice if they were here, but Atlantic Richfield is a proper defendant in this hearing.

There has been no blowing of any statute of limitations. They are here. They have always been here since approximately November of 1982 when the matter was filed; and I believe that any idea that somehow we have . . .